

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 5, 2007

IN THE MATTER OF B.T., T.T., K.T.

**Appeal from the Juvenile Court for Dekalb County
No. 1082-CJ-04 Bratten Hale Cook II, Judge**

No. M2007-01607-COA-R3-PT - Filed January 31, 2008

Mother appeals termination of her parental rights to her three daughters. Finding that the trial court did not err in finding that termination was warranted on statutory grounds and that it was in the children's best interest, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

J. Hilton Conger, Smithville, Tennessee, for the appellant, Mother, C. T.

Robert E. Cooper, Jr., Attorney General and Reporter; Scott Edward Schwieger, Assistant Attorney General, for the appellee, Department of Children's Services.

OPINION

On August 2, 2006, the Department of Children's Services ("DCS" or "Department") filed a petition to terminate the parental rights of Mother and Father to their three daughters: B.T. (born in 1999), T.T. (born in 1997), and K.T. (born in 2001). The record reflects that Father surrendered his parental rights to the Department on August 25, 2006. Consequently, the matter proceeded to determine whether Mother's parental rights should be terminated.¹

The children had been in the Department's custody since September of 2004. In September of 2004, the Department filed a petition for temporary custody of the three daughters alleging drug use by Mother, lack of medical attention when the oldest child broke her arm, and exposure of the

¹ Mother at 27 years of age also has three sons who are not in Mother's custody and who are not the subjects of this termination proceeding.

children to violence in the home. In 2005, Mother stipulated to the allegations in the petition and the three children were adjudicated dependent and neglected.²

The goal of the first Permanency Plan dated October 27, 2004, was to return the children to Mother. The initial Permanency Plan had several goals for Mother to accomplish with an expected achievement date of September 21, 2005. Among the goals set for Mother were alcohol and drug assessment and treatment, drug testing, obtaining suitable housing, and making a legal income. Mother also was to follow recommendations made as a result of the drug assessment and psychological evaluation. Mother refused to attend the staffing for the first Permanency Plan.³ The record reflects Mother was unable to achieve these goals by September of 2005.

Consequently, the second Permanency Plan dated September 29, 2005 revised the goal to return to parent or adoption. This second Permanency Plan basically reiterated the same goals for Mother with an expected achievement date of September 29, 2006. Mother signed as a participant in developing the revised 2005 plan. Mother testified as to the reasonableness of the 2005 plan and no issue is raised on appeal about Mother's knowledge, participation or reasonableness of either the 2004 Permanency Plan or the revised 2005 Permanency Plan. Mother signed an acknowledgment on September 29, 2005, that she received information explaining the criteria and procedures for terminating her parental rights. The petition to terminate Mother's rights was filed before the expected achievement date in August of 2006.

In its 2006 petition, the Department asked that Mother's parental rights be terminated upon the following grounds:

- a) Abandonment by Failure to Visit or Support under Tenn. Code Ann. § 36-1-113(g)(1) and Tenn. Code Ann. § 36-1-102(1)(A)(i);
- b) Abandonment by Failure to Establish a Suitable Home under Tenn. Code Ann. § 36-1-113(g)(1) and Tenn. Code Ann. § 36-1-102(1)(A)(ii);
- c) Substantial Non-Compliance With Permanency Plan under Tenn. Code Ann. § 36-1-113(g)(2); and

²The copy of this order was entered into the record at the hearing of this case without objection. The copy, however, had incorrect reference to the date of the petition and did not bear the judge's signature.

³The record is clear that Mother had notice of the staffing of the 2004 Permanency Plan and voluntarily chose not to attend. We are unable to find in the record that Mother was given a copy of the 2004 Permanency Plan or was made aware of the consequences should she fail to comply with its requirements. However, the record strongly implies Mother was provided a copy of it since DCS proceeded to provide her opportunities to comply with it and Mother never argues on appeal that she was ignorant of the requirements and consequences associated with the 2004 Permanency Plan. It is clear, however, Mother received the revised 2005 Permanency Plan and the consequences of failure to comply with it were fully explained to her. These facts diffuse the impact of a silent record on the 2004 Permanency Plan.

d) Persistent Conditions Preventing Return under Tenn. Code Ann. § 36-1-113(g)(3).

The trial court terminated Mother's parental rights based on all four of the grounds raised by the Department in its petition. Mother appeals alleging the trial court erred in making the following findings: that Mother abandoned the children by willfully failing to support them; that the department made reasonable efforts to assist Mother in finding suitable housing; that Mother failed to make reasonable efforts to find a suitable home; that Mother substantially failed to comply with the permanency plans; and that termination of Mother's rights is in the children's best interest.

On appeal, Mother concedes she had "significant problems" in achieving the goals of the permanency plans which included obtaining a legal means of income, addressing her drug use, and obtain suitable housing. Mother concedes that she repeatedly failed drug tests, ran afoul of the law, failed to pay child support, and failed to secure a legal income or a suitable home.

I. STANDARD FOR TERMINATION OF PARENTAL RIGHTS

A court may terminate a person's parental rights only if (1) the existence of at least one statutory ground is proved by clear and convincing evidence and (2) it is shown, also by clear and convincing evidence, that termination of the parent's rights is in the best interest of the child. Tenn. Code Ann. § 36-6-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d 793 (Tenn. Jan. 23, 2007) *cert. den* __U.S.__, 127 S. Ct. 3020 (2007); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). The higher evidentiary standard, as well as procedural safeguards, exist to prevent unwarranted government interference with a parent's fundamental and constitutionally protected right to the care and custody of his or her children.

The statutes on termination of parental rights provide the only authority for a court to terminate a parent's rights. *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004). Thus, parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). To support the termination of parental rights, only one ground need be proved, so long as it is proved by clear and convincing evidence. *In the Matter of D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

There have been various and varying descriptions of the standard of review this court is to apply when reviewing a trial court's decision in a termination of parental rights case. However, our Supreme Court has most recently indicated that the question of whether a statutory ground has been proved by the requisite standard of evidence is a question of law to be reviewed *de novo* with no presumption of correctness.⁴ *In re the Adoption of A.M.H.*, 215 S.W.3d at 810. A similar approach was taken in *In re Valentine*, 79 S.W.3d at 548, (holding that the question of substantial

⁴The Court also stated the generally applicable standard of review for findings of fact and questions of law in its Standard of Review section of the A.M.H. opinion, as well as generally applicable rules on credibility determinations.

noncompliance with the requirements of a permanency plan was a question of law reviewed *de novo* with no presumption of correctness.)

II. ABANDONMENT

Termination of parental rights on the ground of abandonment is governed by Tenn. Code Ann. § 36-1-113(g)(1) which provides as follows:

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

(1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;

The definitions of abandonment pertinent to this case are found in Tenn. Code Ann. § 36-1-102(1)(A)(i) governing support and Tenn. Code Ann. § 36-1-102(1)(A)(ii) governing suitable housing which provide as follows:

(1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, “abandonment” means that:

(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child;

(ii) The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 36-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child’s situation prevented reasonable efforts from being made prior to the child’s removal; and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardians(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date. . . .

We will discuss each abandonment ground relied upon by the trial court separately.

A. Abandonment by Failure to Support

On appeal, Mother argues that given her limited intellectual ability, mental health issues, and substance abuse issues that “it is difficult to see how the court could find, by clear and convincing evidence, that the Mother had the ability to work and provide support for the children.” In other words, Mother argues that her failure to support was not willful.

The trial court made the following findings on this issue:

Both Permanency Plans required the respondent to pay child support for each of her three children, with the first Permanency Plan being staffed on October 27, 2004. The respondent did not attend that staffing. This Permanency Plan was approved by the Court on March 23, 2005. The respondent did attend the staffing of the second Permanency Plan of September 29, 2005. According to T.C.A. Section 36-1-102(1)(A)(i), the term “abandonment” means that for a period of “four consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of a parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child.” In this case, the only payments made by the respondent for support were two separate payments, one on August 14, 2006 in the amount of \$15.68 and the other on March 23, 2007 in the amount of \$66.67, for a total of \$82.35 since the three children were placed in state custody some 30 months ago. The proof was clear and convincing that the respondent was able-bodied and had the ability to earn at least minimum wage, but failed during the 30 month period to be employed at a public job except for an approximate 4 week period when she worked at Hardee’s Restaurant. During this 4 week period, the respondent worked a total of 91.13 hours (Exhibit 37). Under T.C.A. Section 36-1-102(1)(D), the statute states “For purposes of this subdivision (1), “willfully failed to support” or “willfully failed to make reasonable payments toward such child’s support” means the willful failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to provide more than token payments toward the support of the child.”

In this case, the proof is clear and convincing that the respondent had the ability to provide monetary support for her children, but failed to do so for the first 23 months they were in State custody.

There is no question that Mother knew of her obligation to support her children as evidenced by the 2005 Permanency Plan requiring that she make weekly support payments of \$25.00. In addition, the court entered a later order dated May 22, 2006 wherein Mother agreed to make \$20.61 weekly support payments beginning June 1, 2006.

Mother admitted in her testimony that she was able to work. During the four month period before the August 2006 petition, Mother worked at Hardees for six weeks in May and June of 2006. Jeffrey Scott Herman, senior psychological examiner who performed Mother’s psychological

evaluation, testified that a person of Mother's capabilities was capable of working. While a person with Mother's intelligence may have trouble with academics, Mr. Herman testified that she is not likely to have difficulty with day-to-day tasks and is functionally literate. Mr. Herman concluded that most people with Mother's abilities can hold competitive jobs. The record showed Mother only made two child support payments as discussed in the trial court ruling.

Based on the foregoing, we find no basis to disturb the trial court's conclusion.

B) Abandonment by Failure to Establish Suitable Housing

Mother argues that the trial court erred when it found DCS made reasonable efforts to assist Mother in finding suitable housing. Mother also argues that the court erred when it found Mother made no reasonable efforts to find suitable housing.

The trial court found as follows on this issue:

Based upon the proof presented to the Court, the Court is of the opinion that the weight of the evidence is more than clear and convincing that the petitioner has made reasonable efforts to assist the respondent in establishing a suitable home for the children, however, the respondent has made no reasonable efforts to provide a suitable home and she has demonstrated a lack of concern for her children to such a degree that the Court is convinced that it is unlikely that the respondent will be able to provide a suitable home for her children at an early date, or for that matter, at anytime in the foreseeable future. Since the Petition in this cause was originally filed, the respondent has given birth to two other children out of wedlock, and on the date of the hearing, was residing with the father of those two children. The respondent's oldest child, which is not the subject of this proceeding, has lived with a grandparent for several years. By the respondent's own admission, she testified that she has not been able in the last 21/2 years to care for her children. She testified that she has bipolar, as well as major depressive disorder. Based upon the entire record in this cause, there is no reason to believe that the respondent will ever be able to parent her children, and this is based as much upon her limited ability as upon her lack of desire to become a responsible parent.

The case manager with Life Care Family Services assigned to help Mother find suitable housing met with Mother several times during the months after execution of the revised 2005 Permanency Plan. The case manager testified that she arranged to meet Mother at a place convenient for Mother. Mother was difficult to contact since she stayed at various times with her father, mother, boyfriend, in a car, and in a tent. Also Mother had spent two to three weeks in jail during December of 2005 for violating her probation. The case manager testified that Mother "had some problems from living in the housing project earlier" and for that reason public housing was not an option available to Mother. In addition, Mother had no income and the case manager testified that housing assistance is "very limited" in Mother's area.

While DCS may have made all the efforts that were reasonable under the circumstances, those efforts were obviously limited. The inability of DCS to help Mother find a suitable place to live was due, in large part, to Mother's economic situation as well as her prior conduct. We think Mother's failure to get and keep income-producing employment is more appropriately dealt with as part of the two remaining grounds.

We find there was not clear and convincing evidence to support a finding that the ground set out in Tenn. Code Ann. § 36-1-113(g)(1)(A)(ii) was established.

III. SUBSTANTIAL NON-COMPLIANCE WITH PERMANENCY PLAN

Tennessee Code Annotated § 36-1-113(g)(2) authorizes termination of parental rights for failure to comply with a parenting plan as follows:

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

...

(2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4;

Mother admits on appeal that she "failed in her attempts to comply with many requirements of the permanency plan." Mother argues that much of her non-compliance can be attributed to her mental health problems, substance abuse, and failure by the Department to lend appropriate assistance.

The trial court's order describes a litany of failures by Mother to comply with the Permanency Plans which are not challenged on appeal. It is undisputed that the Department arranged for numerous alcohol and drug assessments, that Mother failed to comply with their recommendations, and that she left a treatment center against medical advice. After Mother's psychological evaluation suggested case management and psychotherapy, DCS set up case management services for Mother. The case manager would arrange to meet Mother at a place convenient for Mother, but her cooperation was sporadic at best and Mother stopped the case management services after only a few meetings. The same held true for DCS's efforts to involve Mother in parenting classes.

The trial court noted in its opinion that the trial court was of the opinion that Mother was given more of an opportunity at reunification than any other person who had come before the trial court. The trial court's finding regarding Mother's noncompliance with the 2005 Parenting Plan is amply supported by the record.

IV. PERSISTENCE OF CONDITIONS

In order to terminate parental rights based upon what is commonly referred to as “persistence of conditions”, the following requirements of Tenn. Code Ann. § 36-1-113(g)(3) must be met:

(3)(A) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(i) The conditions that led to the child’s removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child’s safe return to the care of the parent(s) or guardian(s), still persist;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child’s chances of early integration into a safe, stable and permanent home.

The trial court made the following findings regarding the persistence of conditions:

Under the facts in this case, it is undisputed that the children have been removed from the respondent’s home by Court Order for a period of more than 6 months and the Court FINDS that the conditions that led to the children’s removal still persist, and there is little likelihood that these conditions will be remedied at an early date so that the children can be safely returned to the respondent in the near future, and the continuation of the parent and child relationship greatly diminishes the child’s chances of early integration into a safe, stable and permanent home. The Court has previously found that the responsibilities set out in the Permanency Plans were directly and reasonably related to the conditions which necessitated removal, and the Court FINDS by clear and convincing evidence that the respondent has failed to comply in any substantial manner with those reasonable requirements and responsibilities.

It is not disputed that during the two and one-half years the children were in DCS custody, Mother continued to fail drug tests. It was this problem with substance abuse that caused the children to be taken into custody. In addition, it is not disputed that Mother was unable to establish a suitable home, *i.e.*, absence of violence. This was another problem that led to the children’s custody being placed with DCS.

The trial court’s finding that Mother’s parental rights should be terminated on this ground is not appealed by Mother. Even if it had been raised by Mother, as discussed earlier, the trial

court's conclusion about the Department's reasonable efforts is supported by the record, as is the trial court's findings about the persistence of the conditions that led to the children's removal, essentially an unstable home situation that resulted in a lack of care.

V. BEST INTERESTS

Mother argues on appeal that the trial court erred and that it is not in the children's best interest under Tenn. Code Ann. § 36-1-113(c)(2) to terminate her parental rights based upon her love for her children and the bonds between mothers and daughters. Mother concedes that the children have resided in a single foster home since they have been in DCS custody and have "blossomed" in that home. Their foster parents testified that they intend to adopt the three children. Based on the record before us and the statutory factors we are to consider, we cannot conclude that the trial court erred.

Mother's counsel asks this court to grant Mother more time to overcome the problems in her life. While we agree, and the law requires in most situations, that a parent be given an opportunity to correct problems that prevented them from providing adequate care for their children, Mother has already been given that opportunity and has made little or no progress. Meanwhile, her children have been living in the "limbo" of foster care and now have an opportunity to have a safe and permanent home. We cannot agree that these children's best interests lie in their continuing in foster care indefinitely in the hopes Mother will eventually be able to care for them. It is always unfortunate circumstances that lead a court to conclude that a parent's rights should be terminated. The trial court did not err in its conclusion that it was in the children's best interests to terminate Mother's parental rights.

VI.

The trial court is affirmed. Costs of this appeal are taxed to Mother against whom execution may issue if necessary.

PATRICIA J. COTTRELL, JUDGE